*Blakely*, when sentencing courts treated the Guidelines as mandatory and defendants did not routinely raise Sixth Amendment challenges to judicial factfinding under the Guidelines. As this case itself demonstrates, this Court's decision in *Blakely* put many defendants and courts on notice of the potential for error. After *Blakely*, most defendants who wish to raise Sixth Amendment challenges to sentencing on appeal do so in a timely manner in their opening briefs. This issue should arise rarely or never in appeals briefed after *Booker* because defense counsel are now well aware that the Guidelines are not binding under that decision. This issue thus affects a limited number of cases and can be expected to be of steadily decreasing significance by the time this Court would be able to hear argument on and decide this issue.

This Court recently denied review in *Rodriguez* v. *United States*, 125 S. Ct. 2935 (2005) (No. 04-1148), which involved the application of the plain-error rule, Fed. R. Crim. P. 52(b), to *Booker* error, although that issue implicated a clear conflict in the circuits. U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148). The Court's denial of certiorari in *Rodriguez* is consistent with the fact that it, like this case, presented a "transitional issue * * * [of] limited continuing importance once the cases in which sentences were imposed before *Booker* have become final." *Ibid.* The same conclusion is warranted here.

2. Petitioner is correct (Pet. 23-25) that there is a conflict in the circuits on the proper application of the plain-error test to claims of *Booker* error. That conflict is further analyzed in the government's brief in *Rodriguez*. See U.S. Br. at 11-18, *Rodriguez*, *supra* (No. 04-1148). The petition for a writ of certiorari in *Rodriguez*

presented the same plain-error issue petitioner raises and alleged the same circuit conflict. Pet. at 7-12, *Rodriguez*, *supra* (No. 04-1148). The government suggested in *Rodriguez* that this Court grant certiorari in order to resolve the conflict in the circuits, U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148), but the Court denied review. 125 S. Ct. 2935. There are no circumstances that would warrant a different result in this case.

In any event, the *Rodriguez* issue is not implicated here. The petitioner in *Rodriguez* properly presented his plain-error claim under *Booker* by raising it in his opening brief. See *United States* v. *Rodriguez*, 398 F.3d 1291, 1297 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005). Because the court of appeals deemed petitioner to have abandoned his *Booker* claim by raising it only after briefing in his case was complete, that court did not have occasion to apply plain-error principles to the claimed error. This Court "do[es] not ordinarily address for the first time * * * an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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